

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

NuGate Group, LLC,

Appellant,

RE: Ohana Nui Management, Inc.

Appealed From
Size Determination No. 06-2017-029

SBA No. SIZ-5821

Decided: April 4, 2017

DECISION

I. Introduction and Jurisdiction

On March 2, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2017-029, dismissing a size protest filed by NuGate Group, LLC (Appellant), as non-specific. For the reasons discussed *infra*, the appeal is denied, and the dismissal is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed this appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Protest, and Size Determination

On September 1, 2016, the Contracting Officer (CO) for the U.S. Department of the Navy, NAVFAC Hawaii (Navy), issued Solicitation No. N62478-16-R-2451 as a competitive 8(a) set-aside for grounds and tree maintenance services. The CO assigned to it North American Industry Classification System code 561730, with a corresponding \$7.5 million annual receipts size standard. Amendment 0002, issued October 13, 2016, extended the deadline for initial offers to October 24, 2016.

On February 16, 2017, the CO announced that the Navy had awarded Contract No. N62478-17-D-2451 to Ohana Nui Management, Inc. (Ohana). On February 24, 2017, Appellant filed a size protest with the CO. Appellant stated:

We believe the company exceeded the size standard as a small business for grounds maintenance at the time of submission of their bid.

Data pulled from fpds.gov demonstrates contracts with federal agencies that exceed the 7.5 Million size standard, and does not disclose revenue from private sources.

(Protest at 1.) No data was actually included with the protest.

The CO referred the protest to the Area Office for a size determination.

On March 2, 2017, the Area Office issued Size Determination No. 06-2017-029 dismissing Appellant's protest as non-specific. The Area Office explained:

Your protest, dated February 24, 2017, does not contain specific information indicating Ohana is other than small. Your protest states "Data pulled from fpds.gov demonstrates contracts with federal agencies that exceed the 7.5 Million size standard, and does not disclose revenue from private sources." Although referenced in your protest, you did not provide a copy of the information from the Federal Procurement Data System-Next Generation (FPDS-NG) that you relied on, indicating Ohana's revenues exceed the \$7.5 million size standard for the relevant three most recently completed fiscal year ends. SBA regulations provide that when available, such supporting materials should be submitted with the protest. No supporting materials were submitted with the protest letter. Based upon SBA's review of the information contained within FPDS-NGF, we could not determine that Ohana's average three-year revenues for the relevant periods of 2013 to 2015 exceed the \$7.5 million size standard.

(Size Determination at 1, footnote omitted.)

B. Appeal

On March 17, 2017, Appellant filed the instant appeal. Appellant asserts that an analysis of the revenue reported on FPDS shows awards to Ohana for the period 2013-2016 supporting Appellant's claim that Ohana is other than small. Specifically, that Ohana averages more than \$7.5 million in awards for this period. (Appeal at 1.) Appellant attaches to its appeal 80 pages from FPDS and a 24-page spreadsheet analyzing contracts awarded in the past to Ohana.

As of the April 3, 2017, close of record, Ohana has not responded to the appeal.

III. Discussion

I find that the Area Office properly dismissed Appellant's protest. The regulations governing size determinations provide:

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. Where materials supporting the protest are available, they should be submitted with the protest.

13 C.F.R. § 121.1007(b).

If an area office finds a protest is non-specific, it must dismiss the protest. 13 C.F.R. § 121.1007(c). In the past, OHA has stated that, in reviewing non-specific protests, it will consider “(1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds.” *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009).

Here, Appellant's protest to the CO merely states that Ohana exceeds the size standard, and that data from FPDS shows Ohana has received awards of Federal contracts whose totals exceed the size standard. Appellant failed to include any documentation with its protest, from FPDS or any other source. The Area Office attempted on its own to determine if FPDS contained information to support the protest, but was unable to do so. Thus, the protest included no specific facts, and therefore does not meet the requirements of the regulation. Further, Appellant's protest failed to include the documentation which it alleged would support the protest, as the regulation requires. Appellant should have made this documentation available, and the Area Office was unable to locate it. I therefore agree with the Area Office's finding that the protest was insufficiently specific.

On appeal, Appellant seeks to submit new evidence. OHA will not consider new evidence on appeal unless the Judge orders its submission or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308(a). Appellant has filed no such motion, nor has it provided any reason for its not having submitted this evidence to the CO, when it was available to Appellant at the time Appellant filed the protest. Also, an insufficiently specific protest cannot be cured on appeal by the submission of new evidence. *Size Appeal of AMETEK SCP, Inc.*, SBA No. SIZ-5518 (2013). Accordingly, I DENY Appellant's attempt to submit new evidence on appeal.

I conclude that the instant appeal fails to establish the Area Office erred in dismissing Appellant's size protest, as required by 13 C.F.R. § 134.305(a)(3). Thus, Appellant has failed to meet its burden of establishing the Area Office's dismissal of its protest as insufficiently specific was clear error. 13 C.F.R. § 134.314. I therefore must affirm the dismissal and deny the appeal. *Size Appeal of Jenn-Kans Disposal Service*, SBA No. SIZ-5549 (2014).

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's dismissal of the protest and DENY the instant appeal. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge